***United States Court of Appeals***

***for the Second Circuit***


# RESPONDENT'S BRIEF

# 75-4051

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT


FEDDERS CORPORATION, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

On Petition to Review an Order of the
Federal Trade Commission

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P/S

BRIEF FOR RESPONDENT

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# BRIEF FOR RESPONDENT

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## QUESTIONS PRESENTED

I. Whether the order issued by the Federal Trade Commission to cease and desist is reasonably related to the violations found.

II. Whether the order issued by the Federal Trade Commission to cease and desist is required to be limited to objective representations.

## COUNTERSTATEMENT OF THE CASE

This case arises on a petition to review an order to cease and desist issued by the Federal Trade Commission ("Commission") at the conclusion of an administrative proceeding upon a complaint charging Fedders Corporation ("Fedders") with

violating Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) in its advertising of room air conditioners. 1/ The Commission's amended complaint alleged in Paragraph Six that some of Fedders' advertising contained the following claim:

> RESERVE Cooling Power -- Only Fedders has this important feature. It's your assurance of cooling on extra hot, extra humid days. [App. 9a; 27a.] 2/

The Complaint further charged that three separate misrepresentations were made by this claim. Paragraph Seven charged that this statement represented that Reserve Cooling Power was a unique feature of Fedders' home air conditioners. Paragraph Eight alleged that this representation was false. Paragraph Nine alleged that the statement represented that Fedders had a reasonable basis for its claim of uniqueness and Paragraph Ten charged that this statement was false. Paragraph Eleven charged that the statement also represented that Fedders' air conditioners compared with other air conditioners had "a significantly increased cooling capacity at high loading conditions under customary conditions of use" when in fact, Fedders had no reasonable basis to make such a statement. App. 10a-11a.

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1/ Pertinent provisions of the Act are:

Section 5(a)(1): "Unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce are hereby declared unlawful" (15 U.S.C. § 45(a)(1)).

Section 5(a)(6): "The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce" (15 U.S.C. § 45(a)(6)).

2/ As used herein, "App. ___" refers to the page designation in the Appendix filed by petitioner in this Court.

Fedders in its answer admitted making these claims and that they were false. App. 28a. Fedders contended that its misrepresentations had an insubstantial impact on the public. As an additional defense, Fedders averred that it had discontinued its deceptive advertising. Id.

## COUNTERSTATEMENT OF FACTS

The facts before the Commission, and hence this Court, are based upon stipulations and exhibits introduced by petitioner and are largely uncontested. But see, App. 96a. The following facts are relevant to a decision of the appeal by this Court.

The phrase "reserve cooling power" (hereinafter sometimes "RCP") was coined by the Fedders' advertising department in 1964 and 1965 and featured in its advertising through December 1971 when, as noted above, it was dropped completely after the Commission asked for Fedders to substantiate the claims. App. 62a. The phrase was intended as an expression of the operating characteristics under extreme temperatures of Fedders' room air conditioners. Id. The parties stipulated that for the purposes of this proceeding the phrase means "the ability to function satisfactorily under conditions of extreme heat and humidity." App. 38a.

The parties stipulated that the advertisements challenged by the complaint and the frequency of their appearance would be based upon four sample areas (Florida, Washington, D.C., Philadelphia and New York Metropolitan Areas) covering two representative fiscal years (1969-1970, 1970-1971). App. 51a.

In this limited area and time period Fedders admitted disseminating 173 deceptive advertisements. App. 56a. During these two years advertising expenditures were broken down into several different classes in each of the four representative areas. App. 53a-54a. The amounts stipulated revealed, in part, the total advertising for each area, the total cooperative advertising, the portions of those amounts which included advertising featuring RCP and the portion of those amounts that featured RCP as unique. From these figures the following ratios can be derived for the two-year period.

Ratio Expenditures for Advertisements Claiming Uniqueness for Reserve Cooling Power to Total Advertising Expenditures

| | |
|---|---|
| Florida | 2.1% |
| Washington | 2.03% |
| Philadelphia | 1.94% |
| New York | .143% |
| Total | .736% |

Ratio Expenditures for Advertisements Claiming Uniqueness for Reserve Cooling Power to Total Cooperative Advertising Expenditures

| | |
|---|---|
| Florida | 5.27% |
| Washington | 3.38% |
| Philadelphia | 4.04% |
| New York | .63% |
| Total | 2.47% |

[App. 55a]

The ratio of the number of advertisements claiming uniqueness for Reserve Cooling Power to all Reserve Cooling Power advertisements in the two-year period in the sample area was 5.56%. App. 56a. In the same period the ratio of expenditures for advertisements claiming uniqueness for Reserve Cooling Power to all Reserve Cooling Power advertisements in all areas was 6.5% 3/ App. 57a.

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3/ The Administrative Law Judge used the figure 7.8% (App. 57a) but it was amended in the Final Order to read 6.5% (App. 81a).

The 173 deceptive advertisements representing RCP as unique were placed in newspapers of relatively small circulation in the Washington, D.C., and New York areas and in newspapers of both large and small circulation in the Florida and Philadelphia areas. App. 57a; see 117a-118a.

## The Initial Decision

Based upon the admissions of Fedders and the other evidence of record the Administrative Law Judge concluded that Fedders had misrepresented its product in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. App. 64a-65a. He rejected the discontinuance defense, inter alia, because Fedders had stopped the deceptive advertisements only after it became aware that the Commission was investigating its advertising. App. 66a. He further found that his conclusion that there was no reasonable basis to believe from the circumstances under which the advertising was discontinued that the deceptive advertising would not reoccur was corroborated by the fact that one of Fedders' wholly owned subsidiaries had made a questionable uniqueness claim in a national magazine during the pendency of the proceeding. App. 65a-68a.

The Administrative Law Judge rejected the claim of insubstantiality on the grounds that this clearly was not a de minimis violation and that if the sample figures were typical of a campaign that stretched over several years, thousands of

consumers were deceived by the expenditure of hundreds of thousands of dollars for advertising. He also rejected what appeared to him to be Fedders' claim that "deception is all right if practiced in moderation . . . . [and that] deception [is] permissible if practiced in small town newspapers of limited circulation." App. 68a-71a.

The order the Administrative Law Judge issued prohibited Fedders from making uniqueness claims unless they are, in fact, true and from making any performance claim unless Fedders had a reasonable basis for it. The order also required Fedders to maintain records to support such claims. App. 78a-80a.

## The Commission Opinion and Final Order

Following Fedders' appeal to the Commission, and oral argument thereon, the Commission adopted the findings of fact and conclusions of law of the Administrative Law Judge, except to the extent that the opinion by the Commission was inconsistent. App. 81a. Like the Administrative Law Judge, the Commission found Fedders' affirmative defenses to be "patently without merit." App. 86a.

Turning to the claim of insubstantiality, the Commission noted a dispute between Fedders and counsel supporting the complaint as to the projectability of the sample data and concluded that it need not resolve this issue, especially

since no evidence was offered on it, because the evidence before it showed that Fedders had disseminated 173 admittedly false and deceptive advertisements which was "173 more than the law allows, and far more than warrant an appeal to the discretion to the Commission to omit an order . . . ." App. 87a.

As to the so-called abandonment defense, the Commission rejected it on the ground that Fedders had abandoned its claim only after it knew that the Commission was investigating it and that it was still continuing in the business so that the Commission could not rely on Fedders' ability to police its own advertising without the government looking over its shoulder. App. 88a-89a. The Commission also noted Fedders' apparent inability to control exclusivity claims by its subsidiaries during this proceeding as an additional ground for rejecting the claim. App. 89a.

Considering the scope of the order, the Commission held that Fedders' uniqueness claim was also a claim about the performance of its product and concluded that a prohibition limited solely to uniqueness claims would be inadequate to "insure that the same species of misrepresentation as has here occurred will not happen again." App. 91a.

The Commission did agree with Fedders that the order proposed by the Administrative Law Judge, barring all performance claims without substantiation (for example, claims for quietness and efficiency of operation (App. 78a)) was too broad, and

limited the order to performance characteristics of the general sort involved in the offending advertisements. App. 91a. In this respect, the order now prohibits Fedders only from representing the "air cooling, dehumidification, or circulation characteristics, capacity or capabilities of any air conditioner, unless at the time of such representation respondent has a reasonable basis for such statement or representation . . . ." App. 82a.

## ARGUMENT

### I. The order issued by the Federal Trade Commission to cease and desist is reasonably related to the violations found

Numerous courts have considered the scope of Commission orders, and

> [i]t has been repeatedly held that the Commission has wide discretion in determining the type of order that is necessary to cope with the unfair practices found, e.g., Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 611, and that Congress has placed the primary responsibility for fashioning orders upon the Commission, Federal Trade Commission v. National Lead Co., 352 U.S. 419, 429. For these reasons the courts should not "lightly modify" the Commission's orders. Federal Trade Commission v. Cement Institute, 333 U.S. 683, 726.

Federal Trade Commission v. Colgate Palmolive Co., 380 U.S. 374, 392 (1965). The standard by which the orders of the Commission are to be measured is that "courts will not interfere [with Commission orders] except where the remedy

selected has no reasonable relation to the unlawful practices found to exist." Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428 (1957); Hoving Corp. v. Federal Trade Commission, 290 F.2d 803, 806 (2d Cir. 1961).

One court of appeals has held that: "Once the Government has borne its burden of establishing violations of the law, all doubts about the remedy are resolved in its favor." Adolph Coors Company v. Federal Trade Commission, 497 F.2d 1178, 1189 (10th Cir. 1974), citing, United States v. E. I. du Pont de Nemours & Co., 366 U.S. 316 (1961). For, as the Supreme Court has pointed out "those caught violating the Act must expect some fencing in." Federal Trade Commission v. National Lead Co., supra, 352 U.S. at 431. In each case the propriety of a broad order depends upon the "specific circumstances of the case." Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. at 394.

Fedders, "having lost the battle on the facts, . . . hope[s] to win the war on the type of decree. They fight for the right to continue to use [for other performance claims] . . . the very same weapon with which they carried on their unlawful enterprise." Federal Trade Commission v. National Lead Co., supra, 352 U.S. at 429-30. To do so they seek to limit the Commission's order, prohibiting the type of misrepresentations found to have been made, to a single claim, that of uniqueness. Despite having been caught in conceded violations

of the law Fedders would then still be free to resume the same type of misleading advertising found here for other performance characteristics, knowing full well no "fencing in" will be required until it is again found in violation of the law, and that it will not be subjected to any penalty until still a third violation is found. Such a result would clearly not serve the Commission's "legitimate interest" in effectively stopping the unlawful conduct found. William H. Rorer v. Federal Trade Commission, 374 F.2d 622, 625-26 (2d Cir. 1967).

To the extent that this proceeding is clouded by "confusion and error" (Brief of Petitioner, p. 16) it is solely of Fedders making. Thus, opening its brief before this Court, Fedders incorrectly asserts that:

> The Commission has not challenged and does not challenge any performance characteristic claim made by respondent . . . . It is undisputed that the only offending conduct charged, and the only offending conduct proved, was confined to the falsity of a claim of uniqueness only, to wit, that respondent's air conditioners were the only ones which possessed the characteristic known as "reserve cooling power." [Emphasis in original Brief of Petitioner, p. 1.]

But the claim that a Fedders' air conditioner is unique in providing RCP is a statement about the performance of the product as well, as the Commission found (App. 90a). The distinction Fedders erroneously attempts to draw here is not between a "performance" claim and some other type of claim, but between the ways in which the performance of an air conditioner can be misrepresented.

Further, from the beginning of this proceeding nothing could have been clearer than that the administrative complaint charged Fedders with making three separate and distinct misrepresentations in violation of Section 5 of the Federal Trade Commission Act (15 U.S.C. § 45) through the use of a single statement all of which Fedders admitted.

Reduced to its essentials, Fedders' argument seems to be that the Commission is bound, in finding a violation of the law, to the literal wording of the advertising statement and that the Commission cannot consider other implied misrepresentations the statement may make. Such a contention has often been rejected. E.g., J. B. Williams Co. v. Federal Trade Commission, 381 F.2d 884, 890 (6th Cir. 1967); accord, E. F. Drew & Co. v. Federal Trade Commission, 352 U.S. 969 (1957). Fedders admitted that the statement challenged included all three misrepresentations alleged in the complaint. Before this Court Fedders "does not challenge the Commission's finding that respondent disseminated advertisements violative of applicable law . . . ." Brief of Petitioner, p. 5. What the Commission found and Fedders admitted was that in a single statement Fedders made three material misrepresentations. App. 86a. 4/

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4/ It is instructive to note that Fedders did not challenge the finding that it misrepresented a performance characteristic after the Initial Decision or in this Court on the ground that they were deprived of notice and due process by the Commission changing theories in mid-litigation. See Bendix Corp. v. Federal Trade Commission, 450 F.2d 534 (6th Cir. 1971); Rodale Press, Inc. v. Federal Trade Commission, 407 F.2d 481 (D.C. Cir. 1969).

Both this Court and the Court of Appeals for the Sixth Circuit have recently rejected claims, like that of Fedders here, that because part of a statement is literally true the order should be limited only to the part found to be literally untrue. In National Dynamics Corporation v. Federal Trade Commission, 492 F.2d 1333 (2d Cir. 1974), this Court upheld an order provision prohibiting, inter alia, advertising claims which represent "that an independent laboratory has tested any product or that any laboratory test substantiates or supports performance claims unless they are substantiated . . . ." Id. 492 F.2d at 1336. The advertising in question there boldly proclaimed that the product touted had been "Laboratory Tested and Approved" and listed numerous performance features for the product. It was unchallenged that the product had been so tested and that some of the performance claims could be substantiated; however, the Commission found that one performance feature (duration of effect of the product) listed under the heading had not been tested.

Rejecting a challenge to the scope of the order which applied to all performance claims, this Court held (492 F.2d at 1336):

> Although petitioners contend that Paragraph 4 should, at most, prohibit only unsubstantiated durational claims, the paragraph as written appears reasonably related to the misrepresentations found by the Commission. Accordingly,

we find no flaw in paragraph 4, FTC v. Colgate-Palmolive Co., 380 U. S. 374, 389-390, 85 S. Ct. 1035, 13 L. Ed. 2d 904 (1965). 5/

The decision in National Dynamics, supra, should be controlling in rejecting Fedders' contentions. It is clear that the Commission's order need not be limited to the precise misrepresentation found. A single unsubstantiated performance claim in National Dynamics was sufficient for this Court to uphold the Commission's prohibition against unsubstantiated claims for any performance characteristic, a much broader order than the one in the instant case which is limited to the type of performance claims misrepresented here.

The portion of Supreme Court's opinion in Federal Trade Commission v. Colgate-Palmolive Co., supra, referred to by this Court in National Dynamics, supra, points up the error in Fedders' contention that consumers are not hurt by deception because Fedders' products have RCP. (Brief of Petitioner, pp. 17-18). There the Supreme Court upheld a violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, holding that (380 U.S. at 388) the concern in misrepresentation cases is:

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5/ National Dynamics had contended that the initial complaint and proposed order did not adequately identify the issues to be litigated. However, this Court held that: "the complaint sufficiently alleged that performance claims had not been substantiated through adequate testing and that the product had not been 'fully tested,' and paragraph 4 of the final order is a narrower version of the two portions of the proposed order dealing with representations of testing." 492 F.2d at 1336, n. 2.

" . . . with methods designed to get a consumer to purchase a product, not with whether the product, when purchased, will perform up to expectations." The Court went on to hold (380 U.S. at 389):

> . . . [T]he seller has used a misrepresentation to break down what he regards to be an annoying or irrational habit of the buying public--the preference for particular manufacturers or known brands regardless of a product's actual qualities, the prejudice against reprocessed goods, and the desire for verification of a product claim. In each case the seller reasons that when the habit is broken the buyer will be satisfied with the performance of the product he receives. Yet, a misrepresentation has been used to break the habit and, as was stated in Algoma Lumber [Federal Trade Commission v. Algoma Lumber Co., 291 U.S. 67, 78 (1934)], a misrepresentation for such an end is not permitted.

In the same opinion the Supreme Court put to rest a contention that a single advertisement could only make a single misrepresentation stating (380 U.S. at 391):

> They argue that since the commercials in the present case misrepresented the time element involved in shaving sandpaper, this Court should not consider the additional misrepresentation that the public had objective proof of the seller's claim. As we have already said, these misrepresentations are separate and distinct, and we fail to see why respondents should be sheltered from a cease-and-desist order with respect to one deceptive practice merely because they also engaged in another.

In Firestone Tire & Rubber Co. v. Federal Trade Commission, 481 F.2d 246 (6th Cir. 1973), the court was also faced with an unsubstantiated comparative product performance claim ("stops 25% quicker") and a prohibition against "any" safety or performance claim for any of Firestone's tires without

substantiation. The court there had no trouble finding that the order provision was reasonably related to the violation and affirming it (481 F.2d at 251), nor did it have trouble upholding the Commission's finding that the broad comparative claim was unsubstantiated, despite the fact that Firestone had conducted a single test, on a single surface, at a single speed, which demonstrated that the tire for which the representation was made did stop 29% faster than another Firestone tire. In short, even though the Court was not convinced that the tire would not stop 25% quicker, there was substantial proof to support the Commission's finding that there was not a sufficient basis to make this claim across the board.

Fedders, at each stage of this proceeding, has advanced claims of the "insubstantial" nature of the violation and the "discontinuance" of the offending practice. The consistently devalued nature of these contentions at each stage of this proceeding indicates their lack of merit. Originally advanced as defenses to the complaint (Answer, App. 27a-28a), they were analyzed and rejected by the Administrative Law Judge. App. 65a-71a. In argument before the Commission counsel for Fedders conceded that: "I am well aware that cases do not compel the Commission to dismiss a complaint merely upon proof of discontinuance." (Transcript of Oral Argument p. 6, not designated or printed in Appendix). Similarly, counsel conceded that the

offenses proven were not "de minimis" (Id. p. 7). But he contended that the Commission, because of these two factors, should exercise its discretion and dismiss the complaint (Id. p. 9). Finally, counsel for Fedders opined that if the Commission affirmed the Administrative Law Judge's decision in these two areas a court of appeals probably would not reverse that decision as an abuse of discretion (Id. p. 10). Indeed, before this Court, Fedders has not challenged the findings on either the ground of lack of substantial evidence or abuse of discretion (Brief of Petitioner, p. 5). Here what once was touted as two absolute defenses to the conceded misrepresentations have been relegated to "additional factors, all of which the Commission chose to ignore in considering the question of scope." Brief of Petitioner, p. 20. This statement is incorrect. The Commission gave careful consideration to each claim before rejecting it as a defense. App. 86a-89a. It then turned to the scope of the order, and while it concluded that a prohibition against false representations of performance characteristics was essential, it narrowed that prohibition from "all" performance characteristics to the same species of misrepresentations made "[i]n view of all the circumstances of this case." App. 91a.

In a remarkably similar case, William H. Rorer, Inc. v. Federal Trade Commission, supra, this Circuit considered the appropriate scope of a Commission order. Upholding the Commission's finding that a "serious and extensive" violation

took place (something not challenged in this case) this Court pointed out that a broad order could be justified since the violation did not "'involve an uncertain area of the law,' Swanee Paper, 291 F.2d at 838, or a 'novel application' of the Act, Grand Union, 300 F.2d at 100." Id. 374 F.2d at 625. More specifically in relation to Fedders' contentions here, the Court commented:

> Rorer presses upon us other considerations [for narrowing the scope of the order]; e.g., it discontinued its violation before the Commission filed its complaint and it pledged to the Commission that it would not reinstitute the proscribed practice. Country Tweeds, 326 F.2d at 149; R. H. Macy, Id. [326 F.2d] at 450; see Grand Union, 300 F.2d at 100. But the Commission specifically took these factors into account and as to the former pointed out that when Rorer stopped its discriminatory practice, it was aware that its policy was under Commission scrutiny. See Coro, Inc. v. FTC, 338 F.2d 149, 153 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965). Rorer also emphasizes that it has no prior record of any antitrust violation, a consideration that is relevant but hardly controlling. [Id. 374 F.2d at 625-626.]

The Court went on to modify the Commission's order in Rorer by narrowing the proscription against discriminating in price from all customers to all "retail" customers. In this case the Commission itself made the order narrower than the one recommended by the Administrative Law Judge.

From the foregoing it should be abundantly clear that the Commission's order is properly limited in scope to the exact species of misrepresentations the Commission found.

Fedders advances an argument that the Commission can only prohibit, in a cease-and-desist order, a "variation" on the "basic theme" the Commission has found to violate the law. Brief of Petitioner, pp. 10-18. 6/

While the Commission does not quarrel with the proposition that the order must be reasonably related to the violations found, the cases cited by respondent are wholly inapposite to this case. Essentially each involved a Commission order that prohibited misrepresentations "in any matter" (Brief of Petitioner 11-13). The Commission, of course, did not enter such a broad order in this case. Having found that Fedders misrepresented its product as "unique" in certain respects, in addition to misrepresenting that it outperforms other air conditioners in regard to its air cooling capacity under conditions of extreme heat and humidity, the Commission prohibited representations about uniqueness that are not true and about "air cooling, dehumidification, or circulation characteristics" unless Fedders had a reasonable basis for such performance claims. Clearly these are variations on the basic theme which Fedders had previously orchestrated to mislead consumers. Were the order limited to only prohibiting unsubstantiated "uniqueness" claims (Brief of Petitioner, p. 24)

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6/ It is interesting to note that the five cases Fedders cites in support of this proposition all (except Spiegel, Inc. v. Federal Trade Commission, 411 F.2d 481 (7th Cir. 1969)) antedate the Supreme Court's decision in Colgate-Palmolive, supra, which upheld a prohibition against deceptive "mock-ups" for "any product" based on three advertisements.

Fedders would be free to make other unsubstantiated performance claims so long as it did not characterize them as "unique" properties. For example, a claim like "Fedders has extra cooling power" may arguably be distinguishable from a uniqueness claim but it would still be deceptive since Fedders has admitted that it has no reasonable basis for claiming that the cooling power of its product is superior to other air conditioners. Furthermore, having admitted in this case that the challenged advertisement also misrepresented performance characteristics, they would be free to continue to misrepresent such characteristics. It is indeed absurd to suggest that having been found to violate the law in more than one way, Fedders should only be prohibited from violating the law in one way in the future.

Citing three cases, the second prong of Fedders' attack on the order apparently urges that an order can issue only if a "flagrant" violation exists. Brief of Petitioner, pp. 20-24. These cases are inapplicable to this proceeding for in all three the order under consideration essentially prohibited violating the law in "any manner." Such broad orders have nothing to do with this proceeding where the Commission carefully limited the order to the same species of misrepresentation Fedders admitted. Even if this were considered a broad order, the Supreme Court in Colgate-Palmolive, supra, 380 U.S. at 395, held that a broad order was permissive where three advertisements used the same deceptive practice. In Libby-Owens-Ford Glass Co., et al. v. Federal Trade Commission, 352 F.2d 415 (6th Cir. 1965),

the court upheld an order based upon two deceptive advertisements by one respondent and twenty-two deceptive advertisements by another. Even the decision quoted by Fedders (Brief of Petitioner, p. 21), Joseph A. Kaplan & Sons, Inc. v. Federal Trade Commission, 347 F.2d 785 (D.C. Cir. 1965), is instructive as to the permissive scope of an order. The court there upheld two provisions much broader than that in the instant case on the ground that the respondent had violated the relevant provisions of the law in more than one way (as Fedders did here). The court did modify an order provision that prohibited numerous actions where Kaplan was found to have violated that section of the law in only a single way. In this regard, Fedders' characterization of its activities as a "single offending practice" is an obvious makeweight. The "single" practice violated the law thrice by making separate misrepresentations, a finding Fedders does not challenge. The "single" practice of misrepresenting the product three ways was utilized 173 times in four sample areas (which Fedders claims amounts to approximately one-third of its overall advertising nationwide (See App. 87a)) in only a two-year period. 7/ In one of the few cases relied on by Fedders (Brief of Petitioner, p. 15) this Court has commented on a similar claim, holding:

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7/ While neither the Commission (App. 87a) nor this Court need to resolve the exact magnitude of the offenses perpetrated on the public, it is well to keep in mind the limited nature of the sample when assessing Fedders' claims that only 7/10 of 1% of its advertising was deceptive, on the average only 1 out of 16 RCP advertisements were deceptive, and the slogan was not nationally emphasized (Brief of Petitioner, pp. 7-8, 22-23).

(Continued on following page)

> Petitioner's conduct cannot rightly be treated as "a single instance of unintentional misrepresentation." The advertisement was published twice, on different dates and it solicited numerous readers to make individual purchases of small portions of more than 7,000 yards of goods offered for sale. Such solicitation by false representation cannot be considered as a single act. [Gimbel Bros., Inc. v. Federal Trade Commission, 116 F.2d 578, 579, n. 5 (2d Cir. 1941)].

Finally, Fedders places great emphasis on the fact that it discontinued its offending advertising prior to the issuance of the complaint, Brief of Petitioner, p. 22. It admits that the Commission did not abuse its discretion in refusing to dismiss the complaint in this regard. Id. Undoubtedly, this acknowledgement is predicated upon an awareness of the applicable cases that hold abandonment of an illegal practice does not bar a cease-and-desist order. E.g., Diener's, Inc. v. Federal Trade Commission, 494 F.2d 1132 (D.C. Cir. 1974); Cotherman v. Federal Trade Commission, 417 F.2d 587 (5th Cir. 1969) (where respondents had even ceased business); Libby-Owens-Ford Glass Co. v. Federal Trade Commission, supra (where respondents ceased the offending advertising 18 months before the complaint was issued and promised not to use similar advertisements again);

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7/ (Continued from preceding page)

The Commission, of course, does not need to prove every violation of the law that took place to issue an order. Hoving Corp. v. Federal Trade Commission, supra, 290 F.2d at 806 and n. 6. It should also be noted, in regard to these claims, that Fedders' attempts, through the use of quotation marks, to attribute to the Administrative Law Judge, and hence to the Commission, a finding that unique RCP claims were "buried" is without basis in fact. Brief of Petitioner, p. 8. Finding of Fact 20 does not use the word.

Coro, Inc. v. Federal Trade Commission, 338 F.2d 149 (1st Cir. 1964), cert. denied, 380 U.S. 954 (1965) (a case relied upon by the Commission in its opinion (App. 89a) in which, like this case, the offending practice involved less than one percent of the business and there were assurances that the practice would not be continued since Coro gave up the line of business, but it continued in the same industry). Furthermore, in this case, as the Commission found (App. 89a), there is some question of whether Fedders has discontinued the offending practices since, during the pendency of these proceedings, it disseminated an admittedly false uniqueness claim for one of its products (App. 101a). Fedders attempts to minimize this additional misrepresentation by characterizing it as "one minor and harmless exception" (Brief of Petitioner, p. 22). As the case law demonstrates, a misrepresentation in a publication of nationwide circulation cannot be considered a minor violation of the law (supra). Nor is such a major misrepresentation harmless (supra). Under these circumstances there clearly is no merit to a claim that discontinuance should lead to a narrowing of the order.

II. The order issued by the Federal Trade Commission to cease and desist is not required to be limited to objective representations

Despite the fact that Fedders has been on notice since the inception of this proceeding that an order requiring them to have a reasonable basis consisting of competent scientific,

engineering or other similar objective material or industry-wide standards based on such material for performance claims that it might make for its products could be issued (App. 14a, 78a, 82a), for the first time before this Court it seeks modification of this provision. [8/] Having failed to raise this issue before the Administrative Law Judge or the Commission on appeal, Fedders has failed to exhaust its administrative remedies and is, therefore, precluded from raising the issue before the Court. Moog Industries, Inc. v. Federal Trade Commission, 355 U.S. 411, 414 (1958).

It has long been established that objections to agency decisions must first be voiced to the agency itself before they will be considered by a reviewing court. In United States v. L. A. Tucker Truck Lines, Inc., 344 U.S. 33, 36-37 (1952), the Supreme Court stated:

> We have recognized in more than a few decisions, and Congress has recognized in more than a few statutes, that orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. * * *

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8/ No legal basis for such a modification is advanced. Indeed, the sole reason advanced for such a modification is that the provision as written is "unduly and unfairly restrictive, since, in effect, it would forbid respondent from making any assertion which, because of its subjective nature, cannot be substantiated by objective proof." (Brief of Petitioner, p. 25). This simple conclusory statement should not provide a basis for modification of the order. It is instructive to note that two other air conditioner manufacturers have agreed to order provisions containing the same requirements of objective substantiation of performance claims covered by the order as has been imposed on Fedders. In the Matter of Whirlpool Corporation, et al., FTC Docket No. C-2515 (June 25, 1974); In the Matter of City Investing Company, FTC Docket No. C-2478 (December 3, 1973) (see addendum to this brief).

If this Court considers the issue that Fedders failed to raise before the Commission, it should consider the provisions of Paragraph 2 in the context of the proceeding that was held before the Commission. Courts generally do not read the order of an agency in the abstract, but with reference to the findings of the agency, in the light of the language it uses and in light of the record of the proceeding below. Swift & Co. v. United States, 393 F.2d 247, 356 (7th Cir. 1948). The Commission in authorizing the Special Report that led to Fedders' admission that they had no substantiation for the claims that are the subject of this proceeding, pointed out:

> The claims made in advertising consumer products often lead the consuming public to believe that such claims are substantiated by adequate and well-controlled scientific tests, studies, and other fully documented proof.
>
> If the public and the Commission knew whether substantiation actually exists and the adequacy of substantiation, they would be aided in evaluating competing claims for products, and in evaluating between the seller who is advertising truthfully and one who is unfairly treating both consumers and competitors by representing, directly or by implication, that it has proof when in fact there is none or the proof is inadequate. ["Resolution Requiring Submission of Special Reports Relating to Advertising Claims and Disclosure Thereof by the Commission in Connection with a Public Investigation" 36 Fed. Reg. 12,058, as amended, 35 Fed. Reg. 14,680 (1971)]

This statement, coupled with the instant litigation in which Fedders admitted making representations that implied an objective basis existed for these claims, when as Fedders also admitted, there was no reasonable objective basis for them, makes it clear that the order is not designed to, and does not, prohibit claims which because of their subjective nature would not imply that the claim is substantiated by objective proof. Thus, to the extent that Fedders makes claims that are solely subjective for their product, there is no need for substantiation. However, to the extent that the product claims specified in the order imply they are objective, they must be substantiated. The law, of course, does not prohibit mere "puffing" but the existence of "puffing" depends upon the context in which it is used. E.g., Goodman v. Federal Trade Commission, 244 F.2d 584, 603 (9th Cir. 1957).

The modification of Paragraph 2 proposed by Fedders goes far beyond allowing subjective claims however, and if adopted by this Court, would defeat the entire purpose of the proceeding. Fedders' formulation "if and to the extent such statement is objective in nature and capable of objective proof" would allow it to make any statement that was objective in nature but not capable of objective proof. It was exactly this type of misrepresentation that the Commission's Resolution, supra, and this proceeding were designed to prevent. The proposed modification would, in effect, virtually eliminate the order provision.

Finally, since the Commission's Rules of Practice, 16 C.F.R. § 3.61(d), (e): (1) permit one subject to a cease-and-desist order to ascertain in advance of embarking on a course of action whether it will violate the order, (2) provide for rescission or modification of an order, and (3) state that good faith reliance on Commission advice under these rules will preclude a finding on a violation of the order, the potential harm that can befall Fedders is nonexistent. The Supreme Court and other courts have recognized that this procedure alleviates the need for mathematical precision in a Commission order. Federal Trade Commission v. Colgate-Palmolive Co., supra, 380 U.S. at 394; Giant Food Inc. v. Federal Trade Commission, 322 F.2d 977, 986 (D.C. Cir. 1963), cert. dismissed, 376 U.S. 967 (1964); Regina Corp. v. Federal Trade Commission, 322 F.2d 765, 770 (3rd Cir. 1963); Vanity Fair Paper Mills, Inc. v. Federal Trade Commission, 311 F.2d 480, 488 (2d Cir. 1962).

Since there is no legal or factual basis for the modification of the order that Fedders proposes, it should not be adopted even if this Court considers it.

## CONCLUSION

Wherefore, it is respectfully submitted that the Commission's order to cease and desist should be affirmed and enforced in its entirety. 9/

ROBERT J. LEWIS
General Counsel

GERALD HARWOOD
Assistant General Counsel

DENIS E. HYNES
Attorney

Attorneys for the Federal Trade Commission

July 1975

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9/ "To the extent that the order of the Commission is affirmed, the Court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission." Federal Trade Commission Act, Section 5(c), 15 U.S.C. § 45(c).

ADDENDUM

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

file

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|---|---|
| In the Matter of<br><br>CITY INVESTING COMPANY,<br>a corporation, and<br><br>RHEEM MANUFACTURING COMPANY,<br>a corporation. | DOCKET NO. C-2478 |

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that City Investing Company, a corporation and Rheem Manufacturing Company, a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent City Investing Company, is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its principal offices and place of business located at 767 Fifth Avenue, New York, New York 10022.

Respondent Rheem Manufacturing Company, is a wholly owned corporate subsidiary of City Investing Company, and is organized, existing, and doing business under and by virtue of the laws of the State of California with its principal offices and place of business located at 400 Park Avenue, New York, New York 10022.

The aforesaid respondents cooperate and act together in carrying out the acts and practices herein set forth.

PARAGRAPH TWO: Respondent City Investing Company, is now, and for some time last past has been, engaged in holding diversified industrial and real estate enterprises, including, but not limited to, Rheem Manufacturing Company.

Respondent Rheem Manufacturing Company, is now, and for some time last past has been, engaged in the manufacturing, advertising, sale, and distribution of, among other items, Corsaire and Rheemaire brand residential central air conditioning equipment.

PARAGRAPH THREE: Respondents City Investing Company and Rheem Manufacturing Company cause the said products, when sold to be transported from their place of business in various states of the United States to purchasers located in various other states of the United States and in the District of Columbia. Respondents maintain, and at all times mentioned herein have maintained, a substantial course of trade in said products in commerce, as "commerce" is defined in the Federal Trade Commission Act. The volume of business in such commerce has been and is substantial.

PARAGRAPH FOUR: In the course and conduct of their aforesaid business, and at all times mentioned herein, respondents City Investing Company and Rheem Manufacturing Company have been and now are in substantial competition in commerce, with corporations, firms, and individuals in the sale of products of the same kind and nature as that sold by said respondents.

PARAGRAPH FIVE: In the course and conduct of their aforesaid business, and for the purpose of inducing the purchase of Corsaire and Rheemaire residential central air conditioning equipment, the respondents have made, and are now making, numerous statements and representations in advertisements and commercials with respect to said products.

Typical and illustrative of said statements and representations, but not inclusive thereof, are the following excerpts:

(1) And because it's Rheem you know you're getting the ... most efficient central cooling you can get.

(2) The revolutionary cooling ... system that reconditions and refreshes inside air every second.

(3) And because it's Rheem, you know you're getting the quietest ... central cooling you can get.

PARAGRAPH SIX: Through the use of said advertisements, and others not specifically set out herein, respondents have represented and are now representing, directly or by implication, that:

(1) Rheem Manufacturing Company residential central air conditioning systems are the most efficient central cooling systems one can buy;

(2) Rheem Manufacturing Company residential central air conditioning systems are revolutionary cooling ... systems that recondition and refresh inside air every second, making Rheem systems more advanced than other systems available to consumers.

PARAGRAPH SEVEN: In truth and in fact:

(1) Rheem Manufacturing Company residential central air conditioning systems are not the most efficient central cooling systems one can buy;

(2) Rheem Manufacturing Company residential central air conditioning systems are not revolutionary cooling systems, but are similar to other systems available to consumers.

Therefore, the statements and representations as set forth in Paragraphs Five and Six were and are false, misleading and deceptive.

PARAGRAPH EIGHT: Through the use of said advertisements, and others not specifically set out herein, respondents have also represented and are now representing, directly or by implication, that:

(1) Rheem residential central air conditioning systems are the quietest systems available to consumers, in comparison with like systems made by other manufacturers;

2) At the time they made the representation set forth in Section (1) of this Paragraph, they had a reasonable basis from which to conclude that Rheem residential central air conditioning systems were the quietest systems available to consumers, in comparison with like systems made by other manufacturers.

PARAGRAPH NINE: In truth and in fact, at the time the representation set forth in Section (1) of Paragraph Eight was made, respondents had no reasonable basis from which to conclude that Rheem residential central air conditioning systems were the quietest systems available to consumers, in comparison with like systems made by other manufacturers.

Therefore, the statements and representations as set forth in Paragraph Five and Eight were and are false, misleading and deceptive.

PARAGRAPH TEN: Furthermore, the making of the representation that Rheem Manufacturing Company residential central air conditioning systems are the quietest systems available to consumers, without a reasonable basis for making such representation, is in itself an unfair act or practice in commerce as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH ELEVEN: The use by respondents of the aforesaid false, misleading, and deceptive acts or practices and the heretofore described unfair act or practice has had, and now has, the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PARAGRAPH TWELVE: The aforesaid acts and practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors and constituted and now constitute unfair or deceptive acts and practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 3rd day of December A.D., 1973, issues its complaint against said respondents.

By the Commission.

Chas. A. Tobin

S E A L

Charles A. Tobin,
Secretary.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Lewis A. Engman, Chairman
Paul Rand Dixon
David S. Dennison, Jr.
Mayo J. Thompson

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| In the Matter of<br><br>CITY INVESTING COMPANY,<br>a corporation, and<br><br>RHEEM MANUFACTURING COMPANY,<br>a corporation. | DOCKET NO. C-2478<br><br>DECISION AND ORDER |

The Commission having heretofore determined to issue its complaint charging the respondents named in the caption hereto with violation of the Federal Trade Commission Act, and the respondents having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondents and counsel for the Commission having thereafter executed an agreement containing a consent order, a statement that solely for the purpose of the consent agreement and order the respondents shall not contest the jurisdictional facts set forth in Paragraphs 1,2,3,4, and 12 of the complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondents that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of thirty (30) days, now in further conformity with the procedure prescribed in § 2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent City Investing Company is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 767 Fifth Avenue in the City of New York, State of New York.

Respondent Rheem Manufacturing Company is a wholly owned corporate subsidiary of City Investing Company, and is organized, existing and doing business under and by virtue of the laws of the State of California with its principal office and place of business located at 400 Park Avenue, in the City of New York, State of New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondents, and the proceeding is in the public interest.

ORDER

IT IS ORDERED that respondents City Investing Company and Rheem Manufacturing Company, their successors and assigns, and their officers, agents, representatives, and employees, directly or through any corporation, subsidiary, division or other device, in connection with the advertising, offering for sale, sale or distribution of Rheem Manufacturing Company residential air conditioning products or systems, do forthwith cease and desist from:

1. Representing, directly or by implication, that Rheem Manufacturing Company residential air conditioning products or systems are:

(a) The most efficient cooling products or systems available unless, at the time such representation is made, respondents have a reasonable basis for such representation, which shall consist of competent scientific tests, or industry-wide standards based on such tests established by the Air Conditioning and Refrigeration Institute or by the American Society of Heating, Refrigeration and Air Conditioning Engineers, Inc. or other standards for comparing the efficiency of residential air conditioning products promulgated by similar organizations and based on competent scientific tests.

(b) Revolutionary or more advanced products or systems as compared to those offered by competitors because they recondition and refresh inside air every second; or representing in any manner that any such products or systems are revolutionary or more advanced than other products or systems in any respect unless the characteristics which actually render the products or systems more revolutionary or more advanced are clearly and conspicuously disclosed in immediate conjunction therewith.

2. Representing, directly or by implication, that Rheem Manufacturing Company residential air conditioning products or systems are the quietest such products or systems available to consumers unless, at the time such representation is made, respondents have a reasonable basis for such representation, which shall consist of competent scientific tests, or industry-wide standards based on such tests established by the Air Conditioning and Refrigeration Institute or by the American Society of Heating, Refrigeration and Air Conditioning Engineers, Inc. or other standards for comparing sound or noise levels of residential air conditioning products promulgated by similar organizations and based on competent scientific tests.

3. Making, directly or by implication, any other statements or representations as to the performance characteristics of any residential air conditioning products or systems unless, at the time of such representations or statements, respondents have a reasonable basis for making such representations or statements which shall consist of competent scientific, engineering, or other similar objective material.

4. Failing to maintain accurate records which may be inspected by Commission staff members upon reasonable notice:

(a) Which consist of documentation to support any and all claims made after the effective date of this order in advertising or sales promotion material concerning the performance characteristics of any and all residential air conditioning products or systems:

(b) Which provided the basis upon which respondents relied as of the time those claims were made; and

(c) Which shall be maintained by respondents for a period of three years from the date such advertising or sales promotion material was last disseminated.

IT IS FURTHER ORDERED that each respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions involved in the advertising promotion, distribution, or sale of Rheem residential air conditioning products or systems.

IT IS FURTHER ORDERED that respondents shall notify the Commission at least 30 days prior to any proposed change in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in the corporation which may affect compliance obligations arising out of the order.

IT IS FURTHER ORDERED that respondents herein shall within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with this order.

By the Commission.

Chas. A. Tobin

Charles A. Tobin,
Secretary.

S E A L

ISSUED: December 3, 1973

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

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|---|---|
| In the Matter of<br><br>WHIRLPOOL CORPORATION,<br>a corporation, and<br>DOYLE DANE BERNBACH, INC.,<br>a corporation. | DOCKET NO. C-2515 |

Complaint

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Whirlpool Corporation, a corporation and Doyle Dane Bernbach, Inc., a corporation, hereinafter referred to as respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH ONE: Respondent Whirlpool Corporation is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware with its principal office and place of business located at Benton Harbor, Michigan.

Respondent Doyle Dane Bernbach, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of New York, with its principal office and place of business located at 20 W. 43rd Street, New York, New York.

The aforementioned respondents cooperate and act together in carrying out the acts and practices herein set forth.

PARAGRAPH TWO: Respondent Whirlpool Corporation Inc. is now and has been engaged in the advertising, offering for sale, sale and distribution of Whirlpool air conditioners.

PARAGRAPH THREE: Respondent Doyle Dane Bernbach, Inc. is now and has been an advertising agency for Whirlpool Corporation; it has prepared and now prepares and places advertising, including but not limited to the advertising referred to herein, for the purpose of promoting the sale of the products of respondent Whirlpool Corporation.

PARAGRAPH FOUR: In the course and conduct of its aforesaid business, respondent Whirlpool Corporation now causes and has caused its air conditioners, when sold, to be transported from its place of business in the State of Michigan to purchasers thereof located in various states of the United States, and in the District of Columbia. Respondent Whirlpool Corporation therefore maintains, and at all times mentioned herein has maintained, a substantial course of trade in said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act.

PARAGRAPH FIVE: In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Whirlpool corporation has been, and is now, in substantial competition in commerce with corporations, firms and individuals engaged in the sale of air conditioners of the same general type as that sold by respondent.

In the course and conduct of its business as aforesaid, and at all times mentioned herein, respondent Doyle Dane Bernbach, Inc., has been, and is now, in substantial competition in commerce with corporations, firms and individuals in the advertising business.

PARAGRAPH SIX: In the course and conduct of their business as aforesaid, and for the purpose of inducing the sale of the said air conditioners in commerce, as "commerce" is defined in the Federal Trade Commission Act, respondents have disseminated, and caused to be disseminated, certain advertisements of said air conditioners, including but not limited to, advertisements printed in magazines and newspapers, and advertisements transmitted by television stations located in various states of the United States and in the District of Columbia, having sufficient power to carry such broadcasts across state lines.

PARAGRAPH SEVEN: Typical of the statements and representations contained in said advertisements, but not all inclusive thereof, is the following segment of the audio

portion of a network television commercial for Whirlpool air conditioners:

> On one of those particularly hot days, when its a real struggle just moving around and you have all you can do to keep going, it's nice to come home to a Whirlpool air conditioner. You see only Whirlpool has the special Panic Button to cool you off extra fast... (Emphasis supplied)

PARAGRAPH EIGHT: By and through the use of the aforesaid statements and representations, respondents have represented, directly or by implication, that the "Panic Button" is a unique feature of Whirlpool air conditioners, not found on other air conditioners.

PARAGRAPH NINE: In truth and in fact the "Panic Button" is not a unique feature of Whirlpool air conditioners. In fact, the "Panic Button" is merely a control which activates the highest of the three fan speeds on said air conditioners, and in that respect is substantially similar to controls on comparable air conditioners made by other companies.

Therefore, the statements and representations referred to in Paragraphs Seven and Eight were and are false, misleading, and deceptive, and the advertisements referred to in Paragraphs Six, Seven and Eight were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH TEN: By and through the use of the aforesaid statements and representations, respondents have also represented, directly or by implication, that at the time the aforesaid statements and representations were made, respondents had a reasonable basis from which to conclude that Whirlpool air conditioners, operating at the fan speed activated by the "Panic Button", had an initial cooling capability which was substantially greater than that of comparable air conditioners made by other companies.

PARAGRAPH ELEVEN: In truth and in fact, at the time the aforesaid statements and representations were made, respondents had no reasonable basis from which to conclude that Whirlpool air conditioners, operating at the fan speed activated by the "Panic Button", had an initial cooling capability which was substantially greater than that of comparable air conditioners made by other companies.

Therefore, the statements and representations referred to in Paragraphs Seven, Ten and Eleven were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Six and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH TWELVE: By and through the use of the aforesaid statements and representations, respondents have also represented, directly or by implication, that Whirlpool air conditioners, operating at the fan speed activated by the "Panic Button", have an initial cooling capability which is substantially greater than that of comparable air conditioners made by other companies. At the time said statements and representations were made, respondents had no reasonable basis from which to conclude that such was the fact.

Therefore, the statements and representations referred to in Paragraphs Seven and Twelve were and are false, misleading and deceptive, and the advertisements referred to in Paragraphs Six and Seven were and are unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

PARAGRAPH THIRTEEN: The use by respondents of the aforesaid unfair or deceptive acts or practices has had, and now has, the capacity and tendency to mislead a substantial portion of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of substantial quantities of said products by reason of said erroneous and mistaken belief.

PARAGRAPH FOURTEEN: The aforesaid acts or practices of respondents, as herein alleged, were and are all to the prejudice and injury of the public and of respondents' competitors, and constituted and now constitute unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce in violation of Section 5 of the Federal Trade Commission Act.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this 25th day of June A. D., 1974 issues its complaint against said respondents.

By the Commission.

Charles A. Tobin,
Secretary.

SEAL

Explanation of Consent Agreement from Proposed Respondent Whirlpool Corporation in Whirlpool Corporation, et al., File No. 722 3336.

The consent order the Commission has provisionally accepted from proposed respondent Whirlpool Corporation in Whirlpool Corporation, et al., File No. 722 3336, resulted from a proposed complaint challenging a television commercial which depicted an old prospector in need of quick relief from the heat staggering into a shack and pressing a button on a Whirlpool room air conditioner. The following language was part of the audio portion of the commercial:

> ...[O]nly Whirlpool has the special Panic Button to cool you off extra fast.

The consent order applies to all room air cooling products and central air cooling systems advertised and sold under the "Whirlpool" brand name. The term air "cooling" is used rather than air "conditioning" to clarify that the order covers any product or system that performs an air cooling function, but does not cover products or systems that perform only functions such as air heating or cleaning. The latter types of products, which the order was not intended to cover, could arguably fall within the meaning of the general term "air conditioner."

The major substantive prohibitions of the order, contained in Part I, may be divided into two categories, which correspond to the two types of violation alleged in the proposed complaint. The first set of provisions, which appears in Part I, Paragraphs 1, 2 and 3 comprises the "uniqueness" section of the order. Paragraph 1 directly prohibits one of the representations challenged in the proposed complaint, which is the claim that the "Panic Button," the button which activates the highest fan speed on Whirlpool room air cooling products, is a unique feature of Whirlpool room air cooling products.

Paragraphs 2 and 3 are "fencing-in" paragraphs based on the representation prohibited in Paragraph 1. The purpose of these two paragraphs, which apply to central air cooling systems as well as room air cooling products, is to expand the order coverage beyond the precise practice challenged in the complaint, by prohibiting similar practices with respect to all products covered by the order. Thus, Paragraph 2 prohibits false representations of uniqueness as to any button, control device or any other feature of any product covered by the order, and Paragraph 3 carries the prohibition of false representations of uniqueness to claims that any covered product is unique "in any other material respect."

The second set of provisions in Part I constitutes the "reasonable basis" section of the order. Paragraph 4 directly prohibits the second major practice challenged in the proposed complaint, which is representing, without a reasonable basis for such representation, that Whirlpool room air cooling products have an "initial cooling capability" which is substantially greater than that of comparable air conditioners made by other companies. "Initial cooling capability" is defined in the order as "the speed with which an air conditioner, upon initial activation of the unit, is able to lower the temperature to a given temperature in the area being cooled." The provision of the proposed complaint which gave rise to this order paragraph had alleged, in essence, that in the context of the commercial as a whole, the language quoted above represented that, operating at the fan speed activated by the "Panic Button," the Whirlpool air conditioner had an initial cooling capability which was substantially greater than that of comparable air conditioners made by other companies. The proposed complaint had further alleged that the proposed respondent did not have a reasonable basis for this representation.

Paragraph 5 of the order is a "fencing-in" paragraph, based on the reasonable basis allegations of the proposed complaint. This paragraph is designed to require a reasonable basis for all representations related in any manner to the air cooling function of the products covered by the order. Section (a) of Paragraph 5 requires a reasonable basis in the form of "competent scientific, engineering or other similar objective material" for representations as to the "air cooling, circulation or dehumidification capabilities" of the covered products. Claims concerning air circulation and dehumidification are included because these functions are intimately related to the cooling function.

Section (b) of Paragraph 5 requires a reasonable basis for claims concerning the "efficiency of use of electric power" of the covered products. This provision was included in the order because, as will be discussed below, efficiency is also closely related to the cooling function of the covered products. The nature of the reasonable basis required by Section (b) for efficiency claims differs from that required by Section (a), in that Section (b) requires "competent scientific tests, or industry-wide standards based on such tests" established by certain trade associations, or by an agency of the federal government. The reason for the differing

reasonable basis requirements in the two sections is that while Section (a) covers a potentially great variety of claims for which the proper form of substantiation cannot be foreseen at this time, Section (b) covers one specific type of claim for which established, reliable methods of measurement are presently in existence. Since all of the possible types of claim which could be encompassed by Section (a) cannot be foreseen, it would be inappropriate to limit strictly the types of substantiating material which could be used to provide a reasonable basis under this section. Rather, the general requirement of "competent scientific, engineering, or other similar objective material," which affords flexibility but still requires objective evidence for a reasonable basis, appears preferable.

On the other hand, a widely accepted formula exists for determining the efficiency of air conditioners. According to this formula, the "energy efficiency ratio" is determined by dividing the BTU per hour output by watts of electrical input. In other words, the energy efficiency ratio represents the amount of cooling provided per watt of electricity used. This formula is utilized both by the trade association encompassing manufacturers of room air conditioners, the Association of Home Appliance Manufacturers, and by that encompassing manufacturers of central air conditioning systems, the Air Conditioning and Refrigeration Institute. Since an acceptable method of evaluating efficiency is available, it appears reasonable to require that this method, or an equally reliable one, be used to determine efficiency for purposes of the order. Thus, Section (b) provides the option of utilizing the industry-wide standards for determining efficiency established by the two trade associations mentioned above, but also allows use of any other "competent scientific test" to determine efficiency. In addition, the section allows reliance on industry-wide standards which might be established in the future by some other organization similar to those named in the order, or by the federal government, but only if such standards are based on competent scientific tests.

Part II of the order is a recordkeeping provision which requires the proposed respondent to maintain documentation of individual representations covered by Part I of the order for a period of three years from the date the representation was last disseminated by the proposed respondent, and to make such records available to duly authorized representatives of the Commission upon reasonable written notice. This

provision is similar to the recordkeeping requirement imposed by the Commission in the Firestone case. The Firestone Tire & Rubber Company, Docket No. 8818, issued September 22, 1972, aff'd, The Firestone Tire & Rubber Company v. F. T. C., No. 72-1990 (6th Cir. June 27, 1973). The duration of the over-all recordkeeping requirement in the present matter is limited by the order to ten years.

Part III of the order contains standard administrative requirements included in all orders issued by the Commission.

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

Commissioners:

Lewis A. Engman, Chairman
Paul Rand Dixon
Mayo J. Thompson
M. Elizabeth Hanford
Stephen Nye

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|---|---|
| In the Matter of<br><br>WHIRLPOOL CORPORATION,<br>a corporation. | DOCKET NO. C-2515<br><br>DECISION AND ORDER |

The Commission having heretofore determined to issue its complaint charging the respondent named in the caption hereto with violation of the Federal Trade Commission Act, and the respondent having been served with notice of said determination and with a copy of the complaint the Commission intended to issue, together with a proposed form of order; and

The respondent and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the complaint to issue herein, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having considered the agreement and having provisionally accepted same, and the agreement containing consent order having thereupon been placed on the public record for a period of sixty (60) days, now in further conformity with the procedure prescribed in §2.34(b) of its Rules, the Commission hereby issues its complaint in the form contemplated by said agreement, makes the following jurisdictional findings, and enters the following order:

1. Respondent Whirlpool Corporation is a corporation organized, existing and doing busines[illegible]nder and by virtue of the laws of the State of Delaware with [illegible]rinciple office and place of business locate[illegible]t Be[illegible] Harbor, Michigan.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

## ORDER

### I

IT IS ORDERED that respondent Whi ol Corporation, its successors and assigns, officers nts, representatives and employees, directly or th gh any corporation, subsidiary, division or other device in connection with the advertising, offering for sale, sale or distribution of Whirlpool brand room air cooling products or Whirlpool brand central air cooling systems, hereafter referred to as "such products," in commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. representing, directly or by implication, that the button which activates the highest fan speed on any of Whirlpool brand room air cooling products is a unique feature of such room air cooling products;

2. representing, directly or by implication, that any such products have a button, control, device or other feature which is unique, unless such is the fact;

3. representing, directly or by implication, that any such products are unique in any other material respect unless such is the fact;

4. representing, directly or by implication, that any such Whirlpool brand room air cooling products have an initial cooling capability which is substantially greater than that of comparable room air conditioners made by other companies, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific, engineering, or other similar objective material (For the purposes of this Paragraph, the term "initial cooling capability" shall refer to the speed with which a room air conditioner, upon initial activation of the unit, is able to lower the temperature to a given temperature in the area being cooled);

5. making, directly or by implication, any other statements or representations as to:

   (a) the air cooling, circulation, or dehumidification capabilities of such products, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific, engineering or other similar objective material; and

   (b) the efficiency of use of electric power of such products, unless, at the time such representation is made, respondent has a reasonable basis for such representation, which shall consist of competent scientific tests, or industry-wide standards based on such tests established by the Association of Home Appliance Manufacturers, the Air Conditioning and Refrigeration Institute, or a similar organization, or by an agency of the government of the United States.

II

IT IS ORDERED that respondent Whirlpool Corporation do forthwith cease and desist from failing to maintain and produce accurate records which may be inspected by duly authorized representatives of the Federal Trade Commission upon reasonable written notice by the Commission:

1. which consist of documentation in support of any claims covered under any paragraph of Section I of this Order which are included in advertising or sales promotional material for any such products;

2. which provided the basis upon which respondent relied as of the time those claims were made;

3. which shall be maintained by respondent for a period of three years from the date such advertising or sales promotional material was last disseminated by Whirlpool Corporation.

IT IS FURTHER ORDERED that the provisions of this Section II shall expire ten years from the date this order becomes final.

III

IT IS FURTHER ORDERED that the respondent corporation shall forthwith distribute a copy of this order to each of its operating divisions.

IT IS FURTHERED ORDERED that the respondent corporation notify the Commission at least thirty (30) days prior to the effective date of any proposed change in corporate identity, such as dissolution, transfer or sale of assets or merger or consolidation resulting in the emergence of a successor corporation or the creation or dissolution of subsidiaries, if such proposed change may affect compliance obligations arising out of this Order.

IT IS FURTHER ORDERED that the respondent herein shall within sixty (60) days after service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

By the Commission.

S E A L

Chas. A. Tobin

Charles A. Tobin
Secretary

ISSUED: June 25, 1974

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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| FEDDERS CORPORATION,<br>Petitioner,<br>v.<br>FEDERAL TRADE COMMISSION,<br>Respondent. | Civil Action<br>No. 75-4051 |

CERTIFICATE OF SERVICE

I hereby certify that I have today served the Brief for Respondent Federal Trade Commission by mailing two copies thereof; first class, postage prepaid, to counsel for Petitioners, Sydney B. Wertheimer, Esq., Weisman, Celler, Spett, Modlin & Wertheimer, 425 Park Avenue, New York, New York 10022.

Denis E. Hynes
Attorney

Dated: JUL 23 1975